A

IMEJ TENGGARA SDN BHD v. SEALION HOTEL SDN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
PRASAD SANDOSHAM ABRAHAM JCA
B [CIVIL APPEAL NO: W-02(NCC)(W)-184-01-2015]
3 AUGUST 2016

C ***CONTRACT:*** *Sale and purchase of land – Variation – Request for variation of works subsequent to signing of sale and purchase agreement ('SPA') – Whether payment for variation works distinct from payments under SPA – Absence of formal enforceable contract for variation works – Whether valid enforceable arrangement in law proven – Whether variation orders existed*

D The appellant and the respondent entered into a sale and purchase agreement and a supplemental agreement ('SPA and SA') wherein the appellant agreed to sell and the respondent agreed to purchase the parcels of land to be used as a hotel. The appellant was the turnkey contractor for the hotel whilst the respondent was to operate the hotel. Subsequently, the respondent entered into an agreement with the Accor Group to take on the IBIS-style hotel franchise, which required changes to the design, fittings, mechanical and E other modification to the original proposed hotel. Accordingly, the respondent requested for variation works from the appellant. The variation works were discussed and communicated between the appellant and the respondent by way of correspondences between them, together with the appointed contractor ('Cellini'). There was no formal written agreement F drawn on the variation works as envisaged under the SPA. It was the appellant's case that, consequently, there were two sets of contractual relationship between the parties, *ie*, one under the SPA and SA and the other under the variation orders for the variation works. The appellant contended that each set of contractual relationship required its own distinct payments G and that the payments made to Cellini were towards the variation works. The appellant therefore claimed for the respondent to pay the amount due and owing under the SPA and SA. On the other hand, the respondent's pleaded case was that it had already made payments under the SPA and SA and that by receiving payments directly from the respondent, the appellant had agreed to amend the relevant clauses in the SPA and SA and had waived its right H to strictly comply with the relevant payment clauses in the Third Schedule of the SPA. The Judicial Commissioner ('JC') held that there was no written variation order shown or proven and therefore, the appellant had failed to prove that a valid variation order existed. Hence, the JC held that the payments made were pursuant to the SPA and SA and no more payment was I due and payable under the SPA and SA as claimed by the appellant. On the other hand, the respondent counterclaimed against the appellant to be provided with the mechanical and engineering documents ('M & E

documents') and for damages to be assessed for failure to construct the hotel in good and workman-like manner and failure to rectify the defects to the hotel. The JC dismissed the counterclaim by the respondent. Hence, the appeal by the appellant against the dismissal of its claim and cross-appeal by the respondent against the dismissal of its counterclaim.

Held (allowing appellant's appeal; setting aside order of the High Court and dismissing respondent's cross-appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) There were separate arrangements of the variation orders in relation to the hotel. The contemporaneous documents confirmed that payments were made for these liabilities. The respondent admitted that the variation orders was to capture the costs of additional works that were never envisaged by the SPA and SA, given the subsequent requirements of the respondent for its own hotel. In essence, the respondent admitted the existence and contents of the documents evidencing and confirming the variation works. (para 26)

(2) Sections 60 to 62 of the Contracts Act 1950 place a burden on a debtor to either expressly or by implication to indicate a particular appropriation of payments it makes to its creditor. The contractual discretion is therefore on a creditor to appropriate payment where the debtor fails to intimate the same. The respondent had failed to discharge this burden and therefore the JC erred in insisting that it was the appellant which have to discharge to burden of proof that the variation orders indeed existed. (paras 32-34)

(3) There is no provision in the Contracts Act 1950 that allows the court to appropriate the payments in the way that it was done in this case. The JC had no reason to apply the provisions of the law in the manner that he did and hence, had erred in law in making an assumption that since no variation orders existed, the payment made by the respondent would have to be appropriated for the SPA and SA instead. Even if it might be a case that there was no formal enforceable contract on the variation orders, there remained a valid enforceable arrangement in law between the parties, which the court could not ignore. The court was not entitled to disregard the evidence and decide for the parties how the previous payments were to be appropriated. In the circumstances, the appeal merited judicial intervention. (paras 35-38)

(4) The parties had not intended for the appellant to provide the M & E documents as there were no express terms to that effect in the SPA and SA. The hotel was already functioning without the documents. The respondent also did not adduce any evidence to suggest that it is a reasonable custom and usage in the hotel industry to require the appellant to provide such documents. In the circumstances, the respondent's case did not come within the exception required. Further,

A the respondent had failed to prove any damages resulting from the alleged failure to provide the M & E documents, as evidenced by the hotel running successfully. Hence, there was no appealable error on the respondent's counterclaim. (paras 39-41)

Bahasa Malaysia *Headnotes*

B

Perayu dan responden memasuki satu perjanjian jual beli dan perjanjian tambahan ('PJB dan PT') di mana perayu bersetuju menjual dan responden bersetuju membeli tanah-tanah untuk digunakan sebagai hotel. Perayu adalah kontraktor siap guna bagi hotel tersebut sementara responden akan
C menguruskan hotel tersebut. Kemudian, responden memasuki perjanjian dengan Accor Group untuk menggunakan francais hotel gaya-IBIS, yang memerlukan perubahan kepada rekabentuk, kelengkapan, pengubahsuaian mekanikal dan lain-lain terhadap hotel asal yang dicadangkan. Dengan itu, responden memerlukan kerja-kerja perubahan daripada perayu. Kerja-kerja perubahan dibincangkan dan dimaklumkan antara perayu dan responden
D melalui surat-menyurat antara mereka, bersama-sama dengan kontraktor yang dilantik ('Cellini'). Tiada perjanjian bertulis formal dibuat bagi kerja-kerja perubahan seperti yang dijangka di bawah PJB. Kes perayu adalah bahawa disebabkan perkara ini, terdapat dua set hubungan kontrak antara pihak-pihak, iaitu, satu di bawah PJB dan PT dan satu lagi di bawah perintah
E perubahan bagi kerja-kerja perubahan. Perayu menghujahkan bahawa setiap set hubungan kontrak memerlukan bayaran-bayarannya secara berasingan dan bayaran yang dibuat kepada Cellini adalah bagi kerja-kerja perubahan. Perayu oleh itu menuntut responden membayar jumlah yang tertunggak dan perlu dibayar di bawah PJB dan PT. Sebaliknya, kes responden yang
F diplidkan adalah bahawa ia telah membuat bayaran-bayaran di bawah PJB dan PT dan dengan menerima bayaran secara terus daripada responden, perayu bersetuju meminda klausa-klausa relevan dalam PJB dan PT dan mengetepikan haknya untuk mematuhi secara ketat klausa-klausa bagi bayaran-bayaran relevan dalam Jadual Ketiga PJB. Pesuruhjaya Kehakiman
G ('PK') memutuskan bahawa tiada perintah perubahan ditunjukkan atau dibuktikan dan dengan itu, perayu gagal membuktikan kewujudan perintah perubahan yang sah. Dengan itu, PK memutuskan bahawa bayaran-bayaran yang dibuat adalah menurut PJB dan PT dan tiada lagi bayaran yang tertunggak dan perlu dibayar di bawah PJT dan PT seperti yang dituntut oleh
H perayu. Sebaliknya, responden menuntut balas terhadap perayu untuk dibekalkan dengan dokumen-dokumen mekanikal dan kejuruteraan ('dokumen M & E') dan ganti rugi dinilai atas kegagalan membina hotel tersebut dalam keadaan yang baik dan seperti yang sepatutnya dan kegagalan membaiki kecacatan kepada hotel tersebut. Pesuruhjaya Kehakiman menolak tuntutan balas perayu. Dengan itu, rayuan oleh perayu terhadap penolakan
I tuntutannya dan rayuan balas oleh responden terhadap penolakan tuntutan balasnya.

Diputuskan (membenarkan rayuan perayu; mengetepikan perintah Mahkamah Tinggi dan menolak rayuan balas responden)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Tidak dipertikaikan bahawa wujud pengaturan berasingan bagi perintah perubahan berkaitan hotel tersebut. Dokumen-dokumen semasa mengesahkan bahawa bayaran-bayaran telah dibuat bagi liabiliti-liabiliti ini. Responden mengesahkan bahawa perintah perubahan adalah untuk mendapatkan kos kerja-kerja tambahan yang tidak pernah dibayangkan melalui PJB dan PT, memandangkan keperluan terkemudian oleh responden bagi hotelnya sendiri. Secara asasnya, responden mengakui kewujudan dan kandungan dokumen-dokumen yang membuktikan dan mengesahkan kerja-kerja perubahan.

(2) Seksyen 60 hingga 62 Akta Kontrak 1950 meletakkan beban atas penghutang untuk menunjukkan secara langsung atau tersirat peruntukan bayaran tertentu yang dibuatnya kepada pemiutangnya. Budi bicara kontrak adalah dengan itu atas pemiutang untuk memperuntukkan bayaran di mana penghutang gagal membayangkan perkara tersebut. Responden gagal melepaskan beban ini dan, dengan itu, PK khilaf apabila mendesak bahawa perayu yang perlu melepaskan beban pembuktian bahawa perintah perubahan sememangnya wujud.

(3) Tiada peruntukan dalam Akta Kontrak 1950 yang membenarkan mahkamah memperuntukkan bayaran-bayaran dalam cara yang dibuat dalam kes ini. Pesuruhjaya Kehakiman tiada alasan untuk mengguna pakai peruntukan undang-undang dalam cara yang dibuatnya dan dengan itu, khilaf dari segi undang-undang dalam membuat andaian bahawa disebabkan perintah perubahan tidak wujud, bayaran yang dibuat oleh responden perlu diperuntukkan bagi PJB dan PT. Walaupun ia adalah kes di mana tiada kontrak formal yang boleh dikuatkuasakan bagi perintah perubahan, terdapat pengaturan yang boleh dikuatkuasakan yang sah dari segi undang-undang antara pihak-pihak, yang tidak boleh tidak diendahkan mahkamah. Mahkamah juga tidak berhak mengabaikan keterangan dan memutuskan bagi pihak-pihak bagaimana bayaran terdahulu wajar diperuntukkan. Dalam keadaan tersebut, rayuan ini mewajarkan campur tangan rayuan.

(4) Pihak-pihak tidak meniatkan perayu memperuntukkan dokumen M & E kerana tiada terma jelas baginya dalam PJB dan PT. Perniagaan hotel telah pun berjalan tanpa dokumen-dokumen tersebut. Responden juga tidak mengemukakan apa-apa keterangan untuk menyarankan bahawa ia adalah resam dan kegunaan munasabah dalam industri perhotelan untuk meminta perayu memberikan dokumen-dokumen tersebut. Dalam keadaan ini, kes responden tidak terangkum dalam pengecualian yang diperlukan. Selanjutnya, responden gagal membuktikan apa-apa ganti rugi akibat daripada kegagalan memberikan dokumen M & E yang

A didakwa, seperti yang dibuktikan oleh hotel yang berjalan dengan jayanya. Dengan itu, tiada kekhilafan yang boleh dirayu terhadap tuntutan balas responden.

Case(s) referred to:

B *Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd [2013] 1 LNS 375 CA* ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Government of the State of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***
Joo Seng Trading Co v. Commercial Importers and Distributors Sdn Bhd [2007] 2 CLJ 25 CA ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
C *Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 1 LNS 220 FC* ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(g), (h), 60, 61, 62, 66, 71
Rules of the Court of Appeal 1994, r. 18(2)

For the appellant - Logan Sabapathy, Lesliee Looi & Carmelia Cheong; M/s Dennis Nik
D *& Wong*
For the respondent - Wong Fook Meng & Tan Siok Khoon; M/s Chee Siah Le Kee & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCC-602-10-2013 (overruled in part).]

E *Reported by S Barathi*

JUDGMENT

Rohana Yusuf JCA:

F **[1]** The appellant had filed a claim against the respondent at the High Court in Kuala Lumpur for some payments arising from the sale of the parcels of land and a budget hotel at Fraser Business Park, Kuala Lumpur. The claim of the appellant was dismissed by the High Court. The counterclaim by the respondent was also dismissed. The appellant is
G appealing against the dismissal of its claim and the respondent also is cross-appealing against the dismissal of its counterclaim.

[2] We heard the appeal on 17 September 2015 and we have allowed the appeal of the appellant and dismissed the cross-appeal of the respondent. The
H reasons for our decision are set out below.

Brief Background Facts

[3] The brief background facts leading to this appeal are these. Brampton Holdings Sdn Bhd a developer, was the original land owner which had obtained relevant development approvals in relation to the said lands. After
I obtaining the development approval, discussions were entered between the appellant, the respondent and Brampton for a potential investment over the land. Following the discussions, the appellant and the respondent entered

into a sale and purchase agreement dated 30 June 2008 (SPA). This was followed by a supplemental agreement dated 21 January 2010 (SA). Both these agreements will be referred to as the "SPA and SA".

[4] Under the SPA and SA, the appellant agreed to sell and the respondent agreed to purchase the parcels of land to be used as a hotel. The purchase consideration was RM84 million. The appellant was a turnkey contractor for the hotel. The respondent was to operate the hotel and indeed is now operating the hotel on the world wide chain of hotels known as IBIS Hotel.

[5] Few months after the signing of the SA in April 2010, the respondent entered into negotiation with the Accor Group to take on the IBIS-Style Hotel Franchise. Consequent to that negotiation, the respondent entered into an agreement with the Accor Group as reflected as "Accor Contract". The Accor Group is now running the hotel.

[6] The Accor Group then required changes to the design, fittings, mechanical and other modification to the original proposed hotel. Accordingly, the respondent had requested for variation works from the appellant to fulfil that requirement of the Accor Group. It is the appellant's case therefore that there are two sets of contractual relationship between parties. In its claim, the appellant is seeking for payment under the SPA and SA, premised on the basis that there were two distinct contractual relationships between them; the SPA and SA as one and under the variation orders for the variation works being the other.

[7] The SPA and SA had their own scheme of payment as provided under the third schedule of the SPA as these:

(a) On or before 7 February 2011 the respondent was to furnish a bank guarantee (BG) in favour of the appellant in the sum of RM58.8 million;

(b) The respondent was to deposit with stakeholder RM16.8 million within 14 days from the issuance of certificate of fitness for occupation (CFO);

(c) The appellant was to call the BG upon issuance of CFO;

(d) The stakeholder was to release the sum held:

(i) RM4.4 million upon receipt of CFO by the respondent;

(ii) RM4.2 million upon expiry of 12 months of CFO;

(iii) RM4.2 million upon submission for strata title;

(iv) RM4.2 million upon delivery of memorandum of transfer together with strata title.

The Variation Works

[8] The variation works were discussed and communicated between the appellant and the respondent by way of correspondences between them, together with the appointed contractor Cellini Design Pte Ltd. This is

evidenced from a letter dated 24 February 2011 marked as exh. D1 at p. 39 of common core bundle volume 1 (CCB), a letter dated 30 May 2011 at CCB p. 42 and a letter of 3 August 2011 from Cellini Design Center Pte Ltd at CCB p. 46. The appellant issued a letter confirming the final price of RM7,118,308 at CCB p. 55. The letter addressed to the respondent dated 25 September 2012 from the appellant was acknowledged and stated as "agreed" by Teo Cheng Woon (DW1). DW1 was the managing director of the respondent. There was however, no formal written agreement drawn on the variation works as envisaged under the SPA.

The Appellant's Case

[9] Such were the brief facts, as we have alluded to earlier the appellant maintained its case that there were two separate contractual relationships between them; one being under the SPA and SA and the other under the variation orders for the variation works. The appellant contended that each set of contractual relationship requires its own distinct payments. This was set out in paras. 7 to 10 of the reply and defence to the counterclaim.

[10] In light of the above stand taken by the appellant, its pleaded case was that the payments that it had received directly from the respondent and the bank guarantee under the SPA and SA were as follows:

Date	Particulars	Amount (RM)
30.06.2008	Initial deposit upon execution of SPA	8.4 mil
26.07.2012	Calling on Bank Guarantee	58.5 mil
09.01.2013	Under Clause 3.2(a) of the Third Schedule	4.2 mil
12.04.2013	Under Clause 3.2(c) of the Third Schedule	4.2 mil
	TOTAL	75.6 mil

[11] According to the appellant, the respondent issued a BG of RM58.8 million in favour of the appellant on 10 March 2010. The respondent had also made payment of RM2 million on 2 March 2012 towards variation works as seen in 25 September 2012 letter from the appellant to respondent. It was not in dispute that the respondent paid RM1,611,376 and RM2,588,624 (totalling RM4.2 million) to Cellini. The respondent explained that the payment made to Cellini was to ensure timely completion.

[12] On the other hand, the respondent's pleaded case was that the payment of RM2 million on 2 March 2012, the payments of RM1,611,376 and RM2,588,624 (totalling RM4.2 million) to Cellini on 2 May 2013 were payments made towards the SPA and SA. The respondent therefore, pleaded that it had already made the following payments under the SPA and SA (see CCB, tab 5, pp. 80-81):

Date	Particulars	Amount (RM)
30.06.2008	Initial deposit upon execution of SPA	8.4 mil
02.03.2012	Advance payment	2 mil
26.07.2012	Calling on Bank Guarantee	58.5 mil
10.10.2012	Pursuant to Clause 3.2(a) of the Third Schedule	1,611,376.00 + 2,588,624.00 (totalling 4.2 mil)
09.01.2013	Under Clause 3.2(c) of the Third Schedule	4.2 mil
02.05.2013	Under Clause 3.2(b) of the Third Schedule	4.2 mil
	TOTAL	81.8 mil

The Issues

[13] From the above sets of tables, parties were at variance in relation to the two payments made by the respondent on the two dates of 2 March 2012 and 10 October 2012 in the sum of RM2 million and RM4.2 million respectively. It is the respondent's pleaded case that the payment of RM2 million on 2 March 2012, the payment of RM1,611,376 and RM2,588,624 (total RM4.2 million) made to Cellini as well as the payment of RM4.2 million on 2 May 2013 were all payment towards SPA and SA. The respondent further contended that by receiving payments directly from the respondent, the appellant had agreed to amend the relevant clauses in the SPA and SA and had waived its right to strictly comply with the relevant payment clauses in the third schedule of the SPA.

[14] The appellant's claim is for the respondent to pay the amount due and owing under the SPA and SA. In its statement of claim, the appellant sought for payment of:

(a) RM4.2 million be directly paid to the appellant and/or;

(b) RM4.2 million be paid to the respondent's solicitors as stakeholder.

The appellant had also sought reliefs which include specific performance on (b) above and in the alternative to (b), for payment to be made to a stakeholder.

Preliminary Objections

[15] Before we delve into the main grounds of the appeal, we had to first deal with the two preliminary objections raised by learned counsel for the respondent Encik Wong Fook Meng (Cik Tan Siok Khoon with him). Learned counsel objected to the inclusion of an email dated 12 March 2013 (p. 60 of CCB). The second objection being that the appellant had raised points of law under ss. 66 and 71 of the Contracts Act 1950, which was not pleaded or raised at the High Court. On the first issue, by consent of parties the objected email was excluded from the appeal records.

[16] On the second issue raised, the main contention of learned respondent's counsel was that, no argument on ss. 66 and 71 of the Contracts Act 1950 was raised at the High Court and neither was these grounds found in the memorandum of appeal. Hence, it was contended these grounds should not be allowed to be raised on appeal. We are in agreement with the submission of learned counsel for the appellant, Encik Logan Sabapathy (Cik Leslie Looi and Cik Carmelia Cheong with him) that in raising argument on ss. 66 and 71 of the Contracts Act 1950, the appellant was merely raising these two provisions of the Contracts Act which was not argued by counsel at the High Court. These arguments, the way we understand it, would not be premised on any new fact or evidence which had not been adduced or ought to have been adduced at the trial. Hence, it is within the power and jurisdiction of this court to make its finding as to whether or not, had that legal argument been made before the learned trial judge the decision of His Lordship would have been different.

[17] We are guided by the decision of the Federal Court in *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1967] 1 LNS 220; [1967] 2 MLJ 9. The Federal Court in that case laid out the exceptions that allow an appellate court to entertain points of law raising issue of jurisdiction, and points of law not raised below, which would result in rectification of an erroneous order (see also the decision of the Court of Appeal in *Government of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945; [2010] 5 MLJ 717.

[18] Having considered the above cases and in the light of r. 18(2) of the Rules of the Court of Appeal 1994, we therefore dismissed the preliminary objection raised by learned counsel for the respondent and allowed the parties to ventilate their arguments on ss. 66 and 71 of the Contracts Act 1950.

Findings Of The High Court

[19] The learned Judicial Commissioner (JC) after a full hearing of the matter dismissed the claim of the appellant. His Lordship held that there were no variation orders established by the appellant. The learned JC was referring to cls. 13 and 14 of the SPA on the requirement of variation works to be with written consent of the respondent. It was not in dispute that there was no formal written agreement on variation works. The learned JC made a finding that the appellant had failed to prove that valid variation orders existed. Since no written variation orders was shown or proven, the High Court had assumed that the payment of RM2 million on 2 March 2012 and the payment of RM4.2 million on 10 October 2012 were in fact payments made pursuant to the SPA and SA. As such the High Court found that there was no more payment due and payable under the SPA and SA as claimed.

[20] In his grounds of judgment the learned JC found firstly, the burden of proving that there was a valid or enforceable variation order was on the appellant and that the appellant had not discharged that burden. Hence in

absence of a proven valid variation orders by the appellant, then by default, all payments made by the respondent were treated by the High Court as appropriated towards the SPA and SA instead.

[21] At para. 15 of the grounds of judgment His Lordship observed that, to sustain the case of the appellant that the payment made by the respondents was in fact for the variation orders and not payment in respect of the SPA and SA, the appellant would have to prove that there exists valid variation orders agreed to by the parties. In his grounds of judgment, the learned JC observed as follows:

> It ought not to be forgotten, the case of the Plaintiff is that the Defendant had made the relevant payments in respect of the VO and not the SPA as amended by the SA. Therefore to sustain the contention of the Plaintiff that the payments were indeed made for the VO and not the SPA, the Plaintiff must show there is valid VO agreed by the parties. That contention of the Plaintiff also means of the payments were indeed proven not to be made for the VO, it follows the case of the Plaintiff could not be proven as the payments were instead meant for the SPA as amended by the SA.

Grounds Of Appeal

[22] The decision of the learned JC was essentially criticised by the appellant firstly, for failure of the learned JC to consider the pertinent evidence that goes to support that there was a valid contract for variation works between the parties. Secondly, it was argued that the learned JC had erred on his finding that the burden of proving a valid enforceable variation orders is on the appellant. Having found no valid and enforceable variation order the learned JC was said to have erred in law in assuming that the payment made by the respondent was appropriated for payment towards SPA and SA.

Our Deliberation And Decision

[23] We have perused through the appeal records very carefully. We agree with the appellant's counsel that there was no dispute that parties discussed on variation works. The existence of variation orders was not challenged by the respondent when DW1 in fact admitted that he was the one who requested for the variation works. The core averment of the respondent's case was there was no formal agreement entered into on variation orders.

[24] We have further examined the stand taken by the respondent in relation to the variation works. We found, the letter of 25 September 2012 very revealing of the real position. It bears the signature of DW1 signed as "I confirm and agree". DW1 first said he did sign and acknowledge the 25 September 2012 letter which *inter alia*, stipulates that RM4.2 million was requested by the appellant as a further payment towards variation works. In another part of the said letter, the appellant claimed no responsibility for defects in the works relating to variation orders. Appended to the said letter

was also list of the variation works in Appendix A which disclose the total cost of variation works at a total cost of RM7,118,308. Also noted in the same letter was a payment of RM2 million as advanced received as at p. 55 of CCB.

[25] That letter apart, having perused through the appeal records again we agree with the contention of the appellant that there were some pertinent evidence before the learned JC which pointed to the existence of agreed variation works. The existence of the variation works was never challenged by the respondent (see appeal records, vol 2, pp. 338-339, 346, 349-350, 361, 364). DW1 in fact, had admitted that he was the one who had made a request for certain variations works. The case of the respondent had been that there were no written variation orders as envisaged by cl. 13 of the SPA and SA. Resulting from taking such a stand DW1 testified that despite his signature acknowledging and agreeing that there were variation works, there was no formalised document but only an informal arrangement subject to a supplementary agreement to be formalised. He further testified that he was misled to sign it. But yet DW1 admitted in cross-examination that the respondent did not dispute the appellant crediting payment of RM2 million towards variation works as early as 2 March 2012. Not till 5 July 2013 that the respondent took a positive stand that it was payment towards the SPA and SA and not for variation works.

[26] We are satisfied on the above evidence in the appeal records that there was therefore, no dispute that there existed the separate arrangement of the variation orders in relation to the hotel. The contemporaneous documents confirmed that payments were made for these liabilities. The learned JC had failed to consider that the respondent indeed admitted that the variation orders was to capture the costs of the additional works that were never envisaged by the SPA and SA, given the subsequent requirements of the respondent for its own hotel. The respondent in essence admitted the existence and contents of the documents evidencing and confirming the variation works.

[27] It was also in evidence that from January 2011 to February 2012, the variation orders were discussed and amended through correspondences between the appellant and the respondent, as well as the appointed contractor, Cellini Design Pte Ltd. Letters dated 24 February 2011 from the appellant to the respondent (see CCB, Tab 3 pp. 39-41) caption as "quotation for additional items at owners request", was a quotation for additional works requested by the respondent. Then the letter dated 30 May 2011 from the appellant to the respondent (see CCB pp. 42-45) disclosing discussions and meeting with the Accor Group and stating about prices of items outside the SPA. There was also a letter dated 3 August 2011 from Cellini to the appellant (see CCB pp. 46-48). On 14 February 2012 in fact the parties agreed on a finalised list of variation orders costing RM6,821,968

(see appeal record, vol 3, pp. 619-621). In essence the existence of variation works was in fact not clearly disputed by the respondent, except that there were no formal written variation orders as envisaged by the SPA and SA.

[28] A meeting between PW1 and DW1 took place on 12 September 2012. Following that meeting, the appellant's letter of 25 September 2012 confirming that the final price of the variation orders was RM7,118.308 which was signed by DW1 denoting confirmation and agreement, which we have earlier alluded to.

[29] The fact that the payment made on 10 October 2012 in the sums of RM1,611,376 and RM2,588,624 to Cellini directly was not in dispute. It was also not disputed that a certificate of completion and compliance was issued on 13 June 2012.

[30] In our view, the learned trial judge had failed to give due consideration to the above highlighted evidence to conclude that the appellant had failed to prove or establish the existence of variation orders. We are reminded by learned counsel for the respondent of the constraints imposed upon us to intervene on the findings of facts made by the learned JC. We are mindful of the plethora of cases in support of that trite legal proposition (see *Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd* [2013] 1 LNS 375, *Joo Seng Trading Co v. Commercial Importers and Distributors Sdn Bhd* [2007] 2 CLJ 25). However, when the learned trial judge had failed to consider the material evidence before him, his findings warrant appellate intervention. This, in our view is a case warranting our intervention.

[31] In passing, since cls. 13 and 14 were very much in focus on the issue of whether there existed a valid enforceable variation orders, we pause to take a closer look at the said clauses. In deliberating on these clauses, we are mindful that parties did not raise issue whether the learned JC had correctly applied the clauses to insist on a formal written agreement to effect variation orders. Having perused through the clauses time and time again we remain unclear if these clauses in fact contemplated the "Accor Contract", which require parties to adhere completely to these clauses.

[32] We now move to the other grounds of appeal raised by the appellant. Whilst it is the appellant's complaint that the High Court had failed to properly consider the objective evidence on the existence of separate arrangement relating to the variation orders, it is clear that the High Court had further overlooked the relevant settled principles of contract law in particular on "appropriation of payments" as provided under ss. 60 to 62 of the Contracts Act 1950. Under s. 60 it is provided that:

> Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstance implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

[33] We agree with the contention of the appellant's counsel that these provisions of the Contracts Act 1950 place a burden on a debtor to either expressly or by implication to indicate a particular appropriation of payments it makes to its creditor. Under s. 61, it provides:

> Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at this discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

[34] The above provision is clear that the contractual discretion is therefore on a creditor to appropriate payment where the debtor fails to intimate the same. Where a debtor alleges appropriation to be made in a particular way the burden is on the debtor to prove the same. The respondent in this case has failed to discharge this burden. The learned JC therefore, had erred in insisting that it was the appellant which have to discharge the burden of proof that the variation orders indeed existed.

[35] The burden of proof apart, the learned trial judge had no reason to apply these provisions of the law in the manner that he did. In other words, there is no provision in the Contracts Act 1950 that allow the court to appropriate the payments in the way it was done in this case. The learned JC had in our view, erred in law in making an assumption that since no variation orders existed, the payment made by the respondent would have to be appropriated for the SPA and SA instead.

[36] Furthermore, the Contracts Act 1950 recognises the distinction between agreement and contract under both s. 2(g) and s. 2(h). On the facts and circumstances of this case, even if it may be a case that there was no formal enforceable contract on the variation orders, there remains a valid enforceable arrangement in law between parties, which the court cannot ignore.

[37] We therefore found this appeal merits our judicial intervention, firstly on the failure of the learned JC to judicially assess and appreciate evidence to support a case that there was in existence a distinct and separate arrangement relating to variation works (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, 225). In our view, the approach of the High Court was erroneous for the following reasons *viz*; whether or not the distinct arrangement on the variation order was a valid "contract" as envisaged under the SPA and SA does not mean that distinct contractual arrangement in respect of the variation order did not factually exist; whether or not that distinct arrangement on the variation order was or was not an effective variation to the SPA and SA again does not mean there was no distinct arrangement. We are of the view that the court is duty-bound to analyse the evidence and decide whether that distinct arrangement gives rise to a debt obligation on the part of the respondent to the appellant even if it is not a valid contract as per the SPA. As our observation goes, we do not think the emphasis on cl. 13 of SPA assisted the respondent.

[38] Further, the court was not entitled under the law to disregard the evidence and decide for the parties how previous payments were then to be appropriated, whether under the distinct arrangements for the variation orders or the separate arrangements for the purchase under the SPA and SA.

The Counterclaim By The Respondent

[39] The respondent counterclaimed against the appellant for it to be provided with the mechanical and engineering documents (M & E documents) and for damages to be assessed for failure to construct the hotel in good and workman like manner and failure to rectify defects to the hotel. The learned JC had dismissed the counterclaim of the respondent. In his grounds of judgment, the learned JC found that there were no expressed terms on the obligation of the appellant to provide the M & E documents, under the SPA and SA. We agree with His Lordship's finding that nothing was spelled out with the SPA and SA to oblige the appellant to provide the M & E documents.

[40] We further agree with the findings of the learned JC that none of the exceptions as stated in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 applies. In referring to the three exceptions in that case, we agreed with the learned JC that the parties obviously had not intended for the appellant to provide M & E documents, since it was nowhere stated in the SPA and SA. Secondly, the business efficacy does not demand for these documents, as evidenced that the hotel already could function without them. Thirdly, the respondent did not adduce any evidence to suggest that it is a reasonable custom and usage in the hotel industry to require the appellant to provide such documents. We agree with the learned JC on his findings that the respondent's case did not come within the exception required.

[41] On the counterclaim for damages, the learned JC found that the respondent had failed to prove any damages resulting from the alleged failure to provide M & E documents. This was also evidenced from the fact that the hotel was running successfully. We do not find any appealable error on these findings by the learned JC that merit our appellate intervention. For these reasons we dismissed the cross-appeal of the respondent and affirmed that part of the decision by the learned JC.

[42] In conclusion, and for all the above reasons stated, we allow the appeal of the appellant and set aside that part of the order of the High Court. We make an order for the amount claimed by the appellant be deposited with the stakeholder to be agreed to by the parties, or failing which, to be appointed by the court. We dismissed the cross-appeal by the respondent and affirmed that part of the order by the High Court. We ordered costs of RM50,000 for here and below to be paid to the appellant.